

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MONICA REYES

Claimant

VS.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

Docket No. 1,025,335

ORDER

Respondent requests review of the December 19, 2005 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

The claimant filed an application for hearing on September 21, 2005, which alleged she suffered injury to her low back "on or about May 2, 2005 and each and every working day thereafter."

At the preliminary hearing, after the parties completed examination of claimant, the Administrative Law Judge (ALJ) then asked claimant a number of additional questions regarding the onset of her low back pain as well as when she provided respondent notice that her low back pain was work-related. Based upon the answers to his questions, the ALJ found claimant suffered a series of accidents beginning on October 23, 2004, which culminated on May 3, 2005. The ALJ determined timely notice was provided on October 23, 2004. The ALJ also concluded timely written claim was provided because the time limit for written claim was extended to a year because respondent had not filed an accident report for the October 23, 2004 accident.

The claimant then filed an amended application for hearing on December 22, 2005, which changed the alleged date of accident to a "Series of accidents begining [sic] on 10/23/04 and culminating on 05/03/05."

The respondent requests review of whether claimant met her burden of proof that she suffered accidental injury arising out of and in the course of employment; whether she provided timely notice and written claim; and whether the ALJ exceeded his jurisdiction ordering temporary total disability compensation for the same time period claimant was receiving short-term disability compensation from respondent.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

In May 2004, the claimant was placed in an accommodated job because of upper extremity restrictions she had received for injuries not related to this claim. But claimant was required to push, pull, bend, lift and stoop constantly while handling boxes or pallets. On October 23, 2004, while performing this job claimant felt something pop in her back. Claimant reported the incident and was provided treatment with the plant nurses.

She continued to take medication for her back pain and indicated her pain was controlled by the medication but would wax and wane with activity. She was later transferred to another light-duty job described as watching belts. As claimant performed this job she stated that the captive position standing on an uneven platform caused her back pain but more significantly she developed leg pain. By May 2005, the claimant experienced pain in her low back as well as numbness in the leg and toe.

Due to increasing symptoms in her leg, which claimant did not relate to her back, she took a leave of absence from work. On May 9, 2005, the claimant signed paperwork for her leave of absence. Although the paperwork noted the reason for her leave was unrelated to work, she denied that portion of the form had been filled out when she signed the document.

The claimant clearly provided notice of her back injury on October 23, 2004, and her testimony established that her back condition worsened as she continued working even though the jobs were light duty. Moreover, when she left work she did so because of the increased leg pain which, not being a physician, she did not understand could be related to her back or her work.

Respondent denies timely written claim for the October 23, 2004 injury. The ALJ determined claimant made timely written claim because respondent had not filed an accident report and the time limit was extended to a year from the October 23, 2004 date of accident. The Board agrees and affirms.

The Kansas Workers Compensation Act requires an injured worker to serve a written claim for benefits upon an employer within 200 days of the accident or within 200 days of the last payment of compensation, whichever is later.¹ But the Act also provides

¹ K.S.A. 44-520a.

that the 200-day period is extended to one year when an employer fails to timely file an accident report.²

Respondent argues that there was no evidence that claimant's injuries in October 2004 required that it report the accident. A respondent must file an accident report when the injury is ". . . sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained."³ The claimant described going to the plant nurses for treatments consisting of application of heat packs for 15 to 20 minutes, then a rub down and return to work.⁴ Moreover, the claimant was transferred to the light-duty job watching belts which also is evidence that her injury partially incapacitated her. The evidence established an accident report was required.

Respondent next argues, in the alternative, that it should not be required to pay temporary total disability compensation during the same time period it provided claimant short-term disability compensation.

Whether a worker satisfies the definition of being temporarily and totally disabled during a certain period or whether an employer may be entitled to some type of credit when considering the amount of temporary total disability benefits that may be due an injured worker are not issues the Board has jurisdiction to address in an appeal from a preliminary hearing award. The respondent, however, may raise those issues to the ALJ when the claim is ready for final award.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Brad E. Avery dated December 19, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2006.

BOARD MEMBER

² K.S.A. 44-557(c).

³ K.S.A. 44-557(a).

⁴ P.H. Trans. at 20.

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c: Diane F. Barger, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director